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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MICHAEL WILLIAM GRAY, as Trustee,
etc., et al.,

Plaintiffs and Appellants,

v.

MONTEREY FINANCIAL SERVICES,
INC.,

Defendant and Respondent.

D054386

(Super. Ct. No. 37-2007-00081902-
CU-BC-CTL)

APPEAL from an order of the Superior Court of San Diego County, Ronald L. Styn, Judge. Affirmed as modified.

Michael William Gray and Patricia Ann Gray, as trustees of the Gray Revocable Trust, appeal an order denying in part their motion for attorney fees from Monterey Financial Services, Inc. (Monterey) following their acceptance of Monterey's offer of compromise under Code of Civil Procedure section 998.¹ The Grays contend the court erred by deducting fees they incurred before a certain date that were unrelated to the

¹ Future undesignated statutory references are also to the Code of Civil Procedure unless otherwise specified.

filing of the complaint, as the section 998 offer that contains the fee provision has no temporal limitation on fees. They also contend the court abused its discretion by deducting attorney travel time, and alternatively, by miscalculating the amount of the deduction. Further, they contend the court failed to exercise its discretion on their supplemental request for fees, and remand is required for the exercise of discretion. Lastly, they claim the court erred by not entering a judgment on the section 998 compromise, and the error caused them to incur additional fees the court disallowed. We modify the order to increase the award of fees by \$660. As modified, we affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

The Grays are former employees and shareholders of Monterey, a financial services company that purchases and services accounts receivable. In September 2006 Monterey terminated their employment, and the following month it served them with a notice that it intended to exercise its option under the shareholder agreement to acquire their shares in the company, which they had transferred to their trust.

Monterey hired an appraiser, who in May 2007 issued an appraisal that valued the Grays' shares in the company at \$1.6 million as of September 25, 2006.² Monterey, however, did not pay the Grays the appraised amount or any amount. The parties were unable to negotiate a settlement, and on November 16, 2007, the Grays sued Monterey for breach of contract, specific performance and declaratory relief.

² The appraisal states the appraised value of the Grays' stock was \$1.6 million, but the parties appear to agree there was an appraised value of \$1,617,035.

In April 2008 the court issued a writ of attachment against Monterey to secure the Grays' \$1,617,035 claim. The Grays levied on a Monterey bank account in the amount of \$283,038. In late April the court ordered Monterey to deposit a cashier's check for \$1,334,000 with the court, and to serve the Grays with a copy of the signed order and proof of deposit of the cashier's check with the court. Upon receipt of proof the check cleared, the Grays were to stop levy efforts excluding "the current attachment of \$283,038.04, under the Right to Attach Order in this action." Monterey deposited the check with the court.

In June 2008 Monterey served the Grays with an offer to compromise under section 998, agreeing to pay \$1,617,035 for their stock, with prejudgment interest from October 6, 2007, to the date of the offer. The offer also states, "Defendant agrees to pay Plaintiffs' statutory costs, including attorneys fees, in the amount determined by the Court, according to proof." Further, the offer required the Grays to dismiss their complaint with prejudice.

The Grays accepted the offer, and on July 21, 2008, they submitted to the court a proposed judgment on the offer to compromise. Monterey did not want a judgment entered against it, and on July 23, it applied ex parte for an order enforcing the Grays' acceptance of the offer to compromise, including their agreement to dismiss their complaint with prejudice. The Grays opposed the ex parte application, arguing they were entitled to a judgment.

The court took Monterey's application under submission, and on July 30, 2008, the court issued an order entitled "Order Requiring Compliance with CCP § 998 Offer and

Acceptance." (Some capitalization omitted.) The order noted that as of that date the parties had not complied with the terms of the compromise. The court ordered Monterey to pay the Grays \$1,617,035 for their stock shares, and ordered the clerk of court to release the \$1,334,000 on deposit to the Grays, to be credited against the \$1,617,035. The court also ordered Monterey to pay prejudgment interest, and the Grays' costs, including attorney fees. The court ordered the Grays to dismiss their claims against Monterey with prejudice.

In August 2008 the Grays received full payment of the \$1,617,035. Monterey advised the Grays it would pay the prejudgment interest on their delivery of the stock certificates. Also in August 2008, the Grays moved for \$197,971.71 in attorney fees and costs under the offer to compromise.

The Grays then provided Monterey with two forms: (1) an "Affidavit of Lost Stock Certificates and Indemnification," which was dated September 9, 2008, and (2) a "Stock Assignment Separate from Certificate," which was dated October 20, 2006. (Some capitalization omitted.) The "electronic file path contained in the footer of both documents" caused Monterey to believe the assignment was created after the affidavit was created. Further, a billing by the Grays' attorney included a time entry on August 17, 2008, for time to prepare both documents. Monterey demanded that the Grays "issue a proper Affidavit and Assignment and again reiterated [its] intention to deliver the interest payment upon receipt of a proper stock transfer."

On October 2, Monterey applied ex parte for an order establishing the date of stock transfer as August 15, 2008, when the Grays were paid the full settlement amount,

except interest. Monterey argued that when the Grays finally transferred their stock, they falsely back-dated the assignment to October 6, 2006. Monterey advised the court that despite their acceptance of the section 998 offer, the Grays intended to litigate claims based on the date of stock transfer.

The Grays opposed the ex parte application and requested an additional \$7,832.50 in attorney fees incurred in doing so. The Grays argued the date of transfer was October 2006 when Monterey exercised its option. They also argued the section 998 offer "does not reflect any date that the Grays, under tax or any other law, should be deemed to cease being shareholders of [Monterey]. [Monterey's] self-serving arbitrary suggestion that August 15, 2008 should be the date has no support anywhere in the offer or anywhere else. This action is at an end, and the Court cannot now litigate an issue that is not before it. This issue will be raised with the IRS and, possibly, in a further action."

A hearing was held on October 31, 2008. The court was troubled by the accusation of "forgery." The Grays' attorney explained "this is a tax issue" and "[h]aving a fight over a tax position . . . can't be fraudulent intent." The court responded: "Well, I disagree. If — to reinforce your position on the tax issue, you backdate a document to give you a stronger argument on the tax issue I think would be fraudulent. I'm not saying you did that. I'm saying that's the accusation." The Grays' attorney admitted the assignment was backdated to 2006. He said, "What we intended to do [in 2008] was to say this assignment is effective as of a given date [2006]."

The court declined to make any determination pertaining to the stock transfer date or tax matters. The court, however, advised the Grays' counsel: "I'll tell you right now

that I am bothered by that assignment. I suggest that you prepare a new one that correctly sets forth the facts because the one you prepared is false. There was no — it's dated and it was not signed when it was dated. I don't know if that makes a difference but there should be one that says it was prepared this day, and if you want to say you intended it to be effective as of a certain date, that's fine, and you can argue about that later, but I don't think it's appropriate what you did. I will tell you right now I'm very bothered by that, and I don't know if it makes a difference from a tax point of view or not, but I believe in the truth." The court added, "if you don't change that document, then I'm not going to give you any relief in this case."

In a written order, the court granted the Grays' motion for attorney fees in part and denied it in part. The court awarded \$159,736.26 in attorney fees and \$4,178.26 in other costs. The court determined the offer to compromise did not preclude an award of fees incurred before the lawsuit was commenced (November 16, 2007). The court, however, denied fees incurred before October 6, 2007, unless they were specifically related to the filing of the complaint. The court selected October 6 because that was the payment date specified in a September demand letter the Grays sent Monterey, and the date from which Monterey agreed they were entitled to fees. The court denied fees for attorney travel time "because the court does not award travel time for travel to and from San Diego in cases filed in San Diego." The order does not address the Grays' supplemental request for attorney fees.

DISCUSSION

I

Attorney Fees Incurred Before October 6, 2007

The Grays sought attorney fees from March 2006, even though they did not file their complaint until November 16, 2007. They contend the court erred by ruling they were entitled to fees from October 6, 2007, and to fees before that date only insofar as they pertained to the commencement of the litigation. The court deducted \$31,125.35 in fees incurred before October 6. They assert that under contract principles they reasonably interpreted the section 998 offer to include all fees without any limitation whatsoever, because the offer did not limit fees to any particular period. We disagree with the Grays' position.

"Contract interpretation presents a question of law which this court determines independently. [Citations.] [¶] A contract must be interpreted to give effect to the mutual, expressed intention of the parties. Where the parties have reduced their agreement to writing, their mutual intention is to be determined, whenever possible, from the language of the writing alone." (*Ben-Zvi v. Edmar Co.* (1995) 40 Cal.App.4th 468, 472-473.)

The section 998 offer states the Grays are entitled to "statutory costs, including attorneys fees, *in the amount determined by the Court*, according to proof." (Italics added.) The italicized language indicates the court has discretion to determine the reasonable amount of fees. The Grays' assertion they are entitled to all fees incurred, no

matter how far removed they are from the date the litigation was commenced which resulted in the section 998 offer, is unreasonable.

"The matter of reasonableness of attorney's fees is within the sound discretion of the trial judge." (*Bruckman v. Parliament Escrow Corp.* (1987) 190 Cal.App.3d 1051, 1062.) The court relied on *Stokus v. Marsh* (1990) 217 Cal.App.3d 647, 656, in which the court held that when a party is entitled to reasonable attorney fees, the fees include those incurred in " 'pre-complaint investigation and evaluation of the potential claim,' " as " 'part of the process and expense of litigation.' " The court explained that a " 'contrary decision would encourage the filing of complaints with little or no investigation or evaluation as to the validity of the claim.' " (*Ibid.*)

Here, the court found the Grays "seek fees for more than the 'drafting of initial pleadings, work associated with development of the theory of the case' and 'pre-complaint investigation and evaluation of the potential claim.' " We cannot say the court abused its discretion by excluding fees incurred before October 6, 2007 that were unrelated to the commencement of the litigation. "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.) Contrary to the Grays' assertion, the court's order does not indicate it ignored the language of the attorney fees provision of the section 998 offer.

Further, the court had discretion to exclude attorney fees the Grays incurred before October 6, 2007, because the Grays changed their strategy against Monterey. For many months after Monterey exercised its option to purchase their stock in the company, the Grays argued the exercise was invalid. Monterey disputed that, confirmed its intent to

purchase their stock and hired an appraiser. It was not until mid-April 2007 that the Grays finally agreed "to accept the October 20, 2006 exercise of option as valid and effective," and it was not until September 21, 2007, that the Grays demanded that Monterey pay them for their shares, by making a \$50,000 payment by October 6, 2007, and paying the balance of the \$1,617,035 appraisal under a promissory note. The court could reasonably determine Monterey should not be burdened with fees the Grays incurred in pursuing a theory they abandoned before they commenced the litigation, as those services were not useful or necessary.

The Grays cite *Best v. California Apprenticeship Council* (1987) 193 Cal.App.3d 1448, 1459, but it explains that "the appropriate inquiry to determine whether attorney's fees should be awarded by a court for services provided during administrative proceedings is whether they were *useful and of a type ordinarily necessary to the vindication* of the public interest litigated by the private party." (Italics added.) This case is not to protect the public interest. Other cases the Grays cite are similarly unavailing. (See, e.g., *La Mesa-Spring Valley School Dist. v. Otsuka* (1962) 57 Cal.2d 309, 316 ["The fees recoverable must be a reasonable incident of the suit, proximately and directly resulting from the action. . . . [R]ecovery for such services should not be disallowed merely because performed before the action was filed."]; *Stokus v. Marsh, supra*, 217 Cal.App.3d at p. 655 ["Nothing in [Civil Code section 1717] precludes compensation for fees incurred prior to filing the complaint, where fees were reasonably and necessarily incurred at that time by the prevailing party."].) The mere fact that fees pre-date the commencement of the lawsuit does not mean they are all recoverable.

II

Travel Time

A

Additionally, the Grays contend the court erred by excluding \$7,110 in fees incurred for their attorneys' time in traveling from Irvine to San Diego. They assert the ruling violates public policy because it interferes with a party's right to select an attorney. They criticize the court for ignoring established law allowing for travel time, but they admit they "have not uncovered any *California* cases on point awarding attorneys' fees for travel time." (Italics added.) They rely exclusively on opinions from other jurisdictions that are not binding on courts here. (See., e.g., *U.S. v. City and County of San Francisco* (N.D.Cal. 1990) 748 F.Supp. 1416, 1422 ["Reasonable attorneys' fees include reasonable travel time compensated at the full hourly rate."].)

Monterey argues the Grays have waived appellate review of the issue by not requesting that the court issue a statement of decision on the point. They refer to the general rule that when " 'the court was not asked to, and did not make findings on substantial factual issues, we must infer all findings necessary to support the judgment' and uphold them 'if they are based on substantial evidence' in the record." (*Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal.App.3d 213, 233; see also *Atari Inc. v. State Bd. of Equalization* (1985) 170 Cal.App.3d 665, 675 ["Failure to request findings on specific issues results in a waiver as to those issues."].) Here, however, the court expressly stated in its order that it "further reduces the fees sought for Plaintiffs' counsel's travel time to and from San Diego because the court does not award travel time

for travel to and from San Diego in cases filed in San Diego." What more could the court have said? The waiver rule only applies when the court made no findings on the pertinent issue.

On the merits, we conclude that although travel time may be recoverable in some instances, the court acted within its discretion in determining travel time was unreasonable here. The Grays assert that "if a client knows that attorneys' fees cannot be recovered for travel time from outside of San Diego, a client may be more likely to choose local counsel who may not possess the same expertise as counsel outside of the county." The facts permit a finding, however, that this case does not involve any novel or unique legal issues that could not have been adequately handled by local counsel, and the Grays made no showing they could not find adequate local counsel. Contrary to their assertion, the court's ruling would not "substantially inhibit clients' choices in hiring counsel to represent their interests in San Diego County."

B

The Grays also contend the court miscalculated travel time. The court's order states it "reduces the fees sought by \$1,185.00 (3 hours [at an hourly rate of \$395]) on each of the following dates 3/21/08, 4/11/08, 4/18/08, 4/23/08, 6/13/08 and 7/24/08 (total \$7,110)."

The Grays assert the April 23 and June 13, 2008, appearances were made by an attorney with a \$285 per hour billing rate, rather than the \$395 rate the court applied across the board. Their citations to the record support this assertion, and Monterey

ignores the issue. We modify the court's order to increase the fees awarded by \$660. (Code Civ. Proc., § 43; Cal. Rules of Court, rule 8.264(c).)

The Grays also assert the three-hour deduction is improper as to the remaining four dates "because the only testimony available to the lower court was that the attorney appearing on these dates had at most a two hour round trip commute." They cite paragraph 15 of the October 15, 2008 declaration of attorney Mark Yocca, which states he lives "about an hour from the courthouse," and his round-trip travel from his home is "slightly more than two hours." He made this declaration in support of a request for attorney fees for appearing at an ex parte hearing that month, rather than in support of a request for fees pertaining to any of the travel dates the court excluded.

The Grays do not cite the record to show Yocca was the attorney who traveled to San Diego on any of the travel dates the court disallowed. "The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. It is entitled to the assistance of counsel." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 701, p. 769.) Accordingly, where a party provides a brief without citation to the record establishing the point was made below, we may treat the point as waived or meritless and pass on it without further consideration. (*Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 228.)

Additionally, even if Yocca traveled on the four dates at issue, they cite no evidence showing he traveled from his home rather than his office, which is apparently a three-hour round trip. Accordingly, we cannot say there was abuse of discretion as to the two-hour versus three-hour round trips.

IV

Supplemental Request for Attorney Fees

Further, the Grays contend the court failed to exercise its discretion on their supplemental request for attorney fees. They assert we must remand the matter to the court for consideration and resolution of the request. We disagree.

"A trial court's failure to exercise discretion is itself an abuse of discretion, and we review such action in accordance with that standard of review." (*In re Marriage of Gray* (2007) 155 Cal.App.4th 504, 515.) Ordinarily, when the trial court has not exercised its discretion the appellate court remands the matter to it for its exercise of discretion. (*People v. Orabuena* (2004) 116 Cal.App.4th 84, 100.)

Here, however, the record amply shows that although the court's order does not mention the supplemental request, the court had no intention of granting it. Thus, the order's silence on the matter is harmless as a matter of law. (See *Biss v. Bohr* (1995) 40 Cal.App.4th 1246, 1252; *People v. Lang* (1989) 49 Cal.3d 991, 1011 [failure to exercise discretion may be deemed harmless].) The supplemental fee request was for fees incurred in October 2008 in conjunction with Monterey's effort to have the court set a date of transfer of their stock, and the court was thoroughly upset with the Grays' attorney for backdating their stock assignment. Indeed, the court threatened to disallow *any* fees based on the conduct. We are convinced a remand would be pointless.

V

Entry of Judgment

The Grays also assert the court erred by refusing to enter judgment on the section 998 compromise. Their theory is that because a judgment was not entered, Monterey was able to try to "obtain a better deal for itself" by asking the court to establish a date of transfer of their stock, an issue not addressed in the compromise. Concomitantly, the Grays were required to incur substantial post-acceptance attorney fees on the date of transfer issue, which the court disallowed.

Section 998, subdivision (b)(1) provides: "If the offer is accepted, the offer with proof of acceptance shall be filed and the clerk or the judge shall enter judgment accordingly." In the Grays' view, this unequivocally entitles them to a judgment. The section 998 compromise, however, required them to dismiss their complaint with prejudice. "Several courts have held that a section 998 offer calling for a dismissal with prejudice instead of entry of judgment is valid and enforceable. [Citations.] The rationale of these decisions [is] that a dismissal with prejudice is tantamount to a judgment and a final disposition of the case, and [is] therefore in accord with section 998." (*On-Line Power, Inc. v. Mazur* (2007) 149 Cal.App.4th 1079, 1084-1085.) We find no error, as it is not the court's province to rewrite the parties' agreement. If the

Grays wanted a judgment they should not have agreed to the dismissal with prejudice provision.³

DISPOSITION

The order is modified to increase the attorney fees award by \$660. As modified, the order is affirmed. Monterey is entitled to costs on appeal.

McCONNELL, P. J.

WE CONCUR:

NARES, J.

HALLER, J.

³ In their reply brief, the Grays request an award of attorney fees on appeal. Appellants abandon an issue by failing to raise it in their opening brief. (*California Recreation Industries v. Kierstead* (1988) 199 Cal.App.3d 203, 205, fn. 1.) Further, the Grays are not the prevailing parties on appeal.